Editor's note: Reconsideration denied by Order dated Jan. 24, 1994

OREGON NATURAL DESERT ASSOCIATION ET AL.

IBLA 92-564 Decided January 5, 1993

Appeal from a decision of the Burns, Oregon, District Office, Bureau of Land Management, denying protest against regraveling of a portion of the Steens Loop Road. EA OR-020-2-35.

Reversed and remanded.

1. Environmental Policy Act -- Environmental Quality: Environmental Statements

   The mere fact that a proposed action is consistent with an approved Recreation Area Management Plan does not establish that no further environmental analysis is needed prior to implementing the proposal.

2. Environmental Policy Act -- Environmental Quality: Environmental Statements

   A proposal to regravel a 15-mile segment of a road which bisects two wilderness study areas and provides access to an area of critical environmental concern is not subject to a categorical exclusion from the NEPA process as routine maintenance where the evidence establishes that the proposed action is not properly classified as "routine."

APPEARANCES: Bill Marlett, President, Oregon Natural Desert Association, Bend, Oregon; Craig Miller, Board of Directors, Oregon Natural Resources Council, Bend, Oregon; Stuart Sugarman, President, Oregon Wildlife Federation, Portland, Oregon; Donald P. Lawton, Esq., Assistant Regional Solicitor, Portland, Oregon, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

The Oregon Natural Desert Association (ONDA), the Oregon Natural Resources Council (ONRC), and the Oregon Wildlife Federation have appealed from a decision of the Burns District Office, Bureau of Land Management (BLM), dated June 17, 1992, denying their protests against the regraveling of a 15-mile segment of the Steens Mountain Loop Road. We reverse.

Steens Mountain is located in southeast Oregon's high desert country, about 60 miles south of Burns, Oregon. The Steens Mountain Loop Road is a gravel and dirt two-lane road which commences at State Highway 205 at Frenchglen and proceeds generally southeasterly to Steens Mountain summit. From there, the road loops back in a westerly direction, eventually rejoining Highway 205 approximately 10 miles south of Frenchglen. The Loop Road traverses approximately 52 miles. The part of the road from Frenchglen to the Steens Mountain summit is referred to as the North Loop, while the area from the summit back to Highway 205 is referred to as the South Loop. The Steens Mountain Loop Road from Frenchglen to Fish Lake was constructed by the Civilian Conservation Corps in the 1930's and the entire road was completed in 1962, at which time the segment from Page Springs Campground (near Frenchglen) to at least Lily Lake, and possibly to Fish Lake, was rocked. According to BLM, the entire segment to Fish Lake was re-rocked in 1975. In 1971, approximately 193,000 acres of lands on Steens Mountain were designated the Steens Mountain Recreation Lands, of which in excess of 152,000 acres were in public ownership under the administration of BLM. See 43 CFR 2071.1(b)(1). At the present time, the Steens Mountain Recreation Lands embrace six wilderness study areas (WSA's), as well as an area of critical environmental concern which itself contains five separate research natural areas.

BLM is presently preparing to again re-rock the 15-mile North Loop segment from Page Springs Campground to Fish Lake. 1/ While this

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1/ It must be noted that there is some disagreement in the record as to the length of the segment involved herein. Thus, while the environmental assessment (EA) which was prepared for an analysis of the material source for the road re-rocking (EA-OR-020-235) and BLM's brief both assert that work will be limited to the 15-mile segment from Page Springs Campground to Fish Lake, the Declaration of Michael T. Green, Burns District Manager, BLM, submitted in support of BLM's motion to put the decision into full force and effect, notes that Congress appropriated $ 966,000 for work on the "first 18 miles of the Steens Mountain Loop Road" (Declaration of Michael T. Green at 1). In its statement of reasons in support of its appeal, ONDA pointed out that, in a March 1992 Planning Update, the Burns District Office declared:

"This summer road maintenance crews will be working on the northern portion of the Steens Mountain Loop Road. The selection to be rehabilitated is the 18-mile stretch between the Page Springs gate and the turn off to Fish Lake Campground. The roadway was constructed in 1962 and no serious rehabilitation has been conducted since that time. Maintenance work will include repair or replacement of culverts and cattleguards, reshaping of the existing and [sic] road surface and ditches, and replacing gravel."

ONDA SOR, App. 4.

This inherent confusion over both the length, as well as the nature (see discussion, infra), of the proposed work is, we would suggest, at least partly attributable to the failure of BLM to prepare any environmental analysis of the proposed action.

regraveling operation, however, was not the subject of any formal proposal by BLM and BLM has prepared no Environmental Assessment (EA) as to its effects, BLM did, paradoxically, prepare an EA (OR-020-2-35) with respect to the selection of a source of the gravel for the re-rocking. Appellants used this EA as a vehicle for protesting BLM's failure to prepare an EA with respect to the regraveling of the North Loop segment, 2/ arguing that this violated the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 (1988). Appellants further contended that re-rocking of the North Loop segment constituted an upgrading of the road which would result in increased vehicular traffic with a major potential for creating detrimental effects on an admittedly fragile ecosystem, effects which had never been considered in any NEPA document.

In denying their protests, BLM argued, inter alia, that the effects of increased use had been addressed in the Steens Mountain Recreation Area Management Plan (RAMP) and that the regraveling of the segment was consistent with that plan. BLM challenged appellants' assertions that re-rocking constituted an upgrading of the road base, arguing that the road was merely being brought back to its prior condition. BLM declared that the regraveling was simply "maintenance," and, as such, was categorically excluded from the NEPA process. Finally, BLM rejected appellants' assertions that the re-rocking was contrary to both the Andrews Management Framework Plan (MFP) and the Steens Mountain RAMP, contending that, in fact, the regraveling was in conformance with those two documents. Accordingly, BLM denied the protests. Appellants thereupon pursued an appeal to this Board, generally reiterating the arguments pressed before BLM. 3/

2/ In effect, appellants argued that the failure to prepare an EA for the regraveling operation rendered the EA for the source of the material fatally deficient as it represented an improper bifurcation of the required environmental analysis. See generally Idaho Natural Resources Legal Foundation, Inc., 96 IBLA 19, 94 I.D. 35 (1987).

3/ Pursuant to the provisions of 43 CFR 4.21, the effect of the appeal was to stay the effectiveness of the decision to proceed with the re-rocking of the North Loop segment. On Aug. 7, 1992, BLM moved to have the appeal dismissed or, in the alternative, to have the decision to regravel the segment placed in full force and effect during the pendency of the appeal. By Order dated Sept. 30, 1992, this Board denied the request to place the decision below into full force and effect, noting that:

"[W]hile the matter is not free from doubt, we believe that appellants have made a sufficient showing that an environmental analysis should have been undertaken for the road re-rocking. This being the case, the harm which BLM may needlessly suffer by a delay in re-rocking must be balanced by the possible injury which appellants might suffer should BLM's decision be ultimately reversed after re-rocking has been completed."

While the Board, accordingly, denied the request to permit implementation of the decision below during the pendency of the appeal, it did determine to expedite consideration of the instant appeal in light of the importance of the issues presented to all of the parties.

At the outset, it is important to note that the lands involved in this controversy possess unquestioned "exceptional recreation related values" (Steens Mountain RAMP at 1). As the RAMP notes:

> The combination of high scenic values, a rugged backcountry and primitive environment with a large land area to roam are a backdrop to all recreation opportunities. The significant recreation resources are keyed to the scenic and wildlife values as well as the high degree of solitude and physical challenge provided by the area. The scenery as part of the physical resources previously described draws people to participate in camping, hiking, backpacking and sightseeing.

(RAMP at 8).

BLM adopted the Steens Mountain RAMP in 1985 in order to both prescribe "a comprehensive set of compatible actions which will provide the Steens Mountain a level of resource protection, development and public use consistent with the objectives for these Recreation Lands as well as the interim guidelines for managing wilderness study areas," and to "set forth a sequence for implementing the identified management actions on public lands which are the central theme of this document" (RAMP at 1). In defense of its decision, BLM argues that the re-rocking of the north segment of the Loop Road is fully in accord with the RAMP, while appellants argue that it is directly contrary to this mandate.

In order to understand the source of this conflict, it is necessary to review the RAMP with respect to both those options accepted and those considered but not included in the management program. Three main selected actions were discussed with respect to area access. The first of these was under the general category of "Upgrading of Existing Roads." See RAMP at 25, Action I.D.1. Two separate proposals were approved under this category. The first was a proposal to upgrade the North Loop Road from Lily Lake to Wildhorse Lake Overlook to a high standard gravel road that would allow safe passage of passenger cars. The discussion on this point noted that the road from Lily Lake 4/ to the Wildhorse Lake Overlook had not been upgraded and graveled as had the lower section and that passenger cars with low ground clearance had difficulties traveling over the upper section and were, at times, damaged. The second proposal was to "keep existing roads other than the Steens Loop Road at their current low standard of construction to allow passage of high clearance vehicles" (RAMP at 25 (emphasis supplied)). The second selected action (Action I.D.2.) was to keep the Loop Road open for vehicular travel during weather conditions when there

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4/ BLM's assertion that the segment of the North Loop between Lily Lake and Fish Lake was rocked in 1975 is contradicted by the RAMP which clearly states that "[t]he road from Lily Lake to the Wildhorse Lake Overlook [which includes the segment from Lily Lake to Fish Lake] has not been upgraded and graveled as has the lower section" (RAMP at 25).

would be no damage to the road, and the third selected action (Action I.D.3.) was to develop no new roads for motorized vehicle use in the sub-alpine zone or identified riparian zones. Focussing on the discussion under Action I.D.1, BLM argues that maintenance of the North Loop Road west of Lily Lake as a graveled road suitable for passenger vehicles was clearly presupposed in the proposal to upgrade the road from Lily Lake to the Wildhorse Lake Overlook.

The confusion develops, however, when one examines the alternative proposal under Action I.D.1. which BLM chose not to select. That alternative provided: "Maintain existing roads including the Steens Loop Road to allow passage of passenger cars and two-wheel drive vehicles to specific fishing sites, hunter camps and points of interest. The Loop Road could be hard surfaced" (RAMP at 40 (emphasis supplied)). This option was not selected, apparently owing to fears that "[t]his would cause an increase in vehicle use resulting in the need for more intensive visitor management practices." Id. Pointing out that this alternative was not selected, appellants argue that the RAMP affirmatively rejected maintenance of the North Loop Road to a level sufficient to permit passage of two-wheel drive vehicles and the proposed road re-rocking is, therefore, directly contrary to the RAMP.

While there is a seeming contradiction between these two provisions, the inconsistency is more apparent than real. In this regard, we believe that BLM's argument that maintenance of the North Loop segment from the Page Springs Campground to Lily Lake is part of the approved management scheme is correct. It is uncontradicted that the RAMP approved an alternative to upgrade the North Loop from Lily Lake to Wildhorse Lake Overlook, to permit passage of two-wheel drive vehicles. Such action would be totally inconsistent with the simultaneous rejection of an alternative to maintain the North Loop from Page Springs Campground to Lily Lake at the same level of accessibility since there then would be no way for vehicles to get to Lily Lake to take advantage of the upgraded road base. It seems relatively clear that the phrase "including the Steens Loop Road" related to those sections of the Steens Loop Road beyond Wildhorse Lake Overlook which had never been rocked in the past. Indeed, no other interpretation comes readily to mind which reconciles both alternatives which BLM selected with the alternative that it rejected. Thus, if the sole gravamen of the appeal was that the proposed action was not in accord with the RAMP, the instant appeal would necessarily fail.

[1] The problem, however, is that consistency with the RAMP is not the controlling issue. Indeed, it is, as we shall show, ultimately beside the point. The critical fallacy in BLM's analysis of the RAMP is the assumption that merely because an action is consistent with an approved RAMP it is therefore immunized from any further environmental analysis. The conclusion, however, simply does not flow from the premise.

As an example, BLM attempts to make much of the distinction between the "upgrading" of the North Loop section from Lily Lake to Wildhorse Lake Overlook and the planned "maintenance" of the North Loop from Page Springs

Campground to Lily Lake. We discuss below the inherent weakness of this attempt to base policy on clearly ephemeral terminological distinctions. At the present juncture, we merely wish to point out that if the mere fact that a future action was included in a selected alternative was sufficient to insulate it from further environmental analysis, there would be no point in making this distinction since the "upgrading" of the North Loop section from Lily Lake to Wildhorse Lake Overlook was clearly provided for in the RAMP. Yet, appellants assert, and BLM does not deny, that the Burns District is presently in the process of preparing an EA for the graveling of the North Loop from Fish Lake to the Steens Mountain summit (SOR at 2-3, 12-13). This action by BLM undercuts any implicit assertion by BLM that the mere fact that a proposed course of action was consistent with the RAMP dispensed with the need for any further environmental analysis.

Additionally, a review of the RAMP clearly shows that, in numerous cases of selected alternatives, further environmental analysis would be necessary. Thus, under Action I.C.3., the selected alternative was to "[d]evelop another campground on the South Loop Road now that Blitzen Crossing is closed." In its discussion of this option, however, BLM noted that, while a prospective site for a new campground had been located by BLM, this site was in a WSA and the Interim Management Guidelines might curtail any development at the site. Clearly, the acceptability of the site in question was to be the subject of further environmental analysis.

The ultimate relevancy of the RAMP to this appeal lies only in the fact that, if the RAMP had, as appellants contended, barred re-rocking of the road, then the proposed action could not be sustained, regardless of any environmental considerations, because the proposed action would be inconsistent with the approved RAMP. But the fact that the proposed action is not inconsistent with the RAMP has no direct bearing on the question whether and to what extent further environmental analysis was needed for the proposed re-rocking. In short, whether or not an environmental analysis should have been prepared for the proposal is a separate and independent question from whether or not the proposal was consistent with the RAMP. In view of the foregoing, we must reject any assertion that mere consistency with the RAMP, in and of itself, discharged BLM's obligations under NEPA.

[2] The only possible justification for the failure of BLM to perform an environmental analysis of the effects of the proposed re-rocking is that the action contemplated was categorically excluded from the NEPA process. See, e.g., Colorado Open Space Council, 73 IBLA 226, 230 (1983). BLM contends that it was, arguing that the re-rocking is merely maintenance of the status quo and, therefore, subject to the categorical exclusion for routine maintenance. The arguments advanced to support this contention, however, are both linguistically and legally flawed.

A categorical exclusion is defined to mean "a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect

in procedures adopted by a Federal agency in implementation of these regulations (§ 1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required." 40 CFR 1508.4. The Department has, pursuant to these cited procedures, established criteria used in the determination of whether or not an action is categorically excluded from the NEPA process. See 516 DM 2.3. Thus, the Departmental Manual notes that an action may be categorically excluded from the NEPA process where "(a) The action or group of actions would have no significant effect on the quality of the human environment; and (b) The action or group of actions would not involve unresolved conflicts concerning alternative uses of available resources." 516 DM 2.3A.(1). Pursuant thereto, the Department promulgated a list of actions which would be deemed categorically excluded. BLM relies on the exclusion for "Routine and continuing government business, including such things as supervision, administration, operations, maintenance and replacement activities having limited context and intensity; e.g. limited size and magnitude or short term effects." 516 DM 2, App. 1 at 1.7. It is, however, impossible to discern how the proposed re-rocking can fairly be said to fit into this categorical exclusion.

While it is clear that routine maintenance is categorically exempted from the NEPA process, it seems equally apparent that the proposal herein does not fall within this category. Whether or not the proposal is even "maintenance" may be open to dispute. 5/ That the re-rocking of the North Loop segment is not routine is obvious from a number of factors. First of all, the RAMP, itself, provides estimates of the costs of the various selected alternatives through Fiscal Year (FY) 1993. The estimated costs of Action I.D.1. is $ 3,000 for FY 1991, $ 2,000 for FY 1992, and $ 2,000 for FY 1993. See RAMP at 33. For Action I.D.2., which involved keeping Steens Loop Road open to vehicular travel when no damage would result, no additional funds were allocated. Id. To suggest that the expenditure of

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5/ BLM's attempt to argue that the re-rocking is maintenance merely because the RAMP calls it "maintenance" cannot be credited. Indeed, an analysis of the RAMP clearly shows that it used the terms "maintenance" and "upgrading" almost interchangeably. For example, in the discussing the alternative which it rejected under Action I.D.1., the RAMP describes it as "[m]aintain existing roads including the Steens Loop Road to allow passage of passenger cars and two-wheel drive vehicles to specific fishing sites, hunter camps and points of interest." Thus, while this alternative clearly proposed the "upgrading" of roads in the area (see discussion in text, supra), it used the term "maintain." Moreover, the budget justification under which an appropriation to carry out the project was obtained referred to the proposed action as "reconstruction," a term, I would suggest, which does not normally imply mere maintenance. In view of the foregoing, little reliance can be placed on the fact that one document or another used the term "maintenance" in determining whether or not this is maintenance within the meaning of the categorical exclusion. What is important is what the action entailed, not how it was labeled.

up to $ 966,000 for road re-rocking 6/ is merely routine maintenance is patently absurd. Moreover, the fact that BLM submitted a particular budget justification to obtain the funds underlines the non-routine nature of the proposal.

Indeed, an examination of the budget justification presented to Congress raises serious questions as to the scope of the proposed work. Not only does the budget justification refer to the work as "reconstruction" of the road, it also states that "the access road will be widened and redesigned to eliminate excessive grade and hazardous curves." That redesigning and widening of the road could scarcely be described as routine maintenance seems self-evident. More importantly, since the North Loop segment separates two WSA's, the possible impact of any widening or redesigning of the roadbed between these two WSA's could have significant impacts. In the absence of any environmental analysis of the proposed re-rocking, however, just what those impacts are and how significant they might be is impossible to determine.

Finally, as appellants point out, even if the proposed re-rocking could somehow be termed "routine maintenance" within the scope of the categorical exclusion, the Departmental Manual specifically excepts from the exclusion any proposed action which may "[hade adverse effects on such unique geographic characteristics as * * * wilderness areas, * * * or ecologically significant or critical areas." 516 DM 2, App. 2 at 2.2. See also Sierra Club Legal Defense Fund, Inc., 84 IBLA 311, 92 I.D. 37 (1985). That the proposed action may have such adverse affects is demonstrable.

Appellants' primary concern is related to the fear that improving the roadbed so that more passenger vehicles may reach the summit of Steens Mountain will both change the nature and increase the quantum of use of the area and damage the unique fragile environment found in the Steens Mountain Recreation Lands. That these fears are not fanciful is clearly established by a review of the Andrews MFP Plan, which covered Steens Mountain and which clearly evidenced substantial concern for the effects increased visitor use could have on the area. The RAMP, itself, expressly declared that "[p]rotection of areas from excessive recreation, grazing and other potentially damaging uses is essential for an ongoing viable management system" (RAMP at 18). See also RAMP at 40 (noting that an increase in visitor use would result "in the need for more intensive visitor management practices").

Finally, while BLM has argued that the RAMP contemplated increased visitor usage of the area, the RAMP estimated that, in FY 1992, approximately 23,000 people would visit the High Steens. Appellants assert, and

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6/ Admittedly, the total figure in the budget justification included an unspecified amount for preliminary survey and design work for a visitor contact/administrative center and new campground facilities. It seems likely, however, particularly in view of BLM's submissions, that the majority of the money would be expended on the North Loop segment from the Page Springs Campground to Fish Lake.

BLM does not deny that, in point of fact, "over 50,000 people visit the area every year" as of the present time (SOR at 16). Assuming that appellants' figures are even remotely accurate, it seems clear that the present situation, prior to any improvement in access, far outstrips the factual predicates utilized in the RAMP. This change in circumstances, by itself, should be deemed sufficient to require BLM to analyze the effect of its proposed road re-rocking, since the ultimate impacts of this action might fairly be said to greatly exceed any reasonable expectations present in 1985 when the RAMP was prepared.

We wish to make it clear, however, that we recognize that there may exist a fundamental tension between the goal of making Steens Mountain accessible to more people, as BLM desires, and retaining the area in a relatively untrammeled condition, as appellants prefer, and that neither option is inherently superior to the other. The role of resource managers is often to select from among numerous incompatible options that alternative which they believe is most beneficial to the greatest number of people, knowing full well that, whatever option is selected, many will dispute their choice. So long as the consequences of the various options are fairly analyzed, this Board must give considerable deference to the ultimate policy selections of the resource managers. But, where, as here, an option is selected without any analysis of its environmental consequences, deference to the decision below would constitute a complete abdication of our own responsibilities.

A few comments concerning the dissenting opinion are appropriate. The decision in Sierra Club v. Hassell, 636 F.2d 1095 (5th Cir. 1981), on which the dissent relies in support of BLM's refusal to examine the environmental consequences of the regraveling of the North Loop, is far too weak a reed to support the weight which the dissent would place upon it. That decision involved a 1979 joint determination by the Federal Highway Administration (FHWA), the Coast Guard, and the Army Corps of Engineers, among others, to rebuild the Dauphin Island bridge after it had been destroyed by Hurricane Frederic earlier in the year. While it is true that the Coast Guard classified the project as a "categorical exclusion," 7/ it is also a fact that FHWA determined, after extended analysis, that the rebuilding was a "non-major action" since it merely replaced and did not improve access to the island, while the Corps of Engineers issued a finding of no significant impact (FONSI). See Sierra Club v. Hassell, 503 F. Supp. 552, 559 (S.D. Ala. 1980).

7/ While the dissent is correct to the extent that the Coast Guard did refer to a "categorical exclusion," there is nothing in the text of either the District Court's or Court of Appeals' decision which supports the dissent's assertion that "[t]he court considered whether the action qualified for the same categorical exclusion that BLM applied in this case." Indeed, unless the dissent wishes to suggest that the complete destruction of bridges during hurricanes is "routine" and that the rebuilding of totally destroyed structures is mere "maintenance," it is difficult to see how the action in Hassell can fairly be said to constitute "routine maintenance."

Moreover, in contrast to the total lack of consideration afforded to the environmental consequences of the proposed regraveling herein, both the District Court and the Court of Appeals took particular note of the extensive record before them which showed the consideration of a number of alternative modes of providing access, including ferry and airplane service. Indeed, the Court of Appeals expressly pointed out that it was only "[a]fter conducting its own environmental investigation," that the Coast Guard "classified the project as a categorical exclusion." 636 F.2d at 1098. This merely echoed the factual finding of the District Court that "[a]ppropriate scrutiny of environmental concerns underlies the non-major action decision of FHWA, the negative declaration of the Corps of Engineers, and the categorical exclusion decision of the Coast Guard." 503 F. Supp. at 559.

Finally, while the dissent attempts to argue that the factual situation in Hassell is similar to that which obtains in the instant appeal, the two situations differ in a fundamental consideration. Thus, the Court of Appeals expressly noted that "[t]he duty to prepare an environmental impact statement is thus triggered by the regulations when there is to be a change in the status quo." 636 F.2d at 1099. The Court continued, noting that, in the case before it, the "status of the environment to be considered was that with the bridge in place, prior to its destruction." Id. What the dissent ignores, however, is that the decision to rebuild the bridge was made in the same year that it was destroyed. In this case, however, the decision to regravel the road was made long after the road base had deteriorated. Thus, the status quo in this case for the purpose of determining the effects of the proposal is a deteriorated road base and, therefore, contrary to the dissent's assertion, the decision herein represents an alteration in and not the maintenance of the status quo. See Louisiana v. Lee, 758 F.2d 1081, 1086 (5th Cir. 1985). While the record before the Board may be inadequate to establish that an EIS is needed before proceeding with this alteration in the status quo, it is sufficient to require that, at a minimum, an EA be prepared.

Finally, with respect to the showings required in the context of this appeal, it is the dissent and not appellants which indulges in unsupported allegations. The standard of proof before this Board merely requires that a party establish its contentions by a preponderance of the evidence. There is no requirement that it prove them beyond a reasonable doubt or that an appellant negate unarticulated considerations which might support the decision below. Indeed, in the context of a FONSI, the Court of Appeals for the Fifth Circuit has expressly noted that "[b]ecause the agency's decision that an impact statement is not required pretermits the fact-gathering process designed by Congress, its decision, not plaintiff's contentions, must be reviewed to determine if it reasonably supports an absolute." Louisiana v. Lee, supra at 1085. In this case, appellants have clearly established, by a preponderance of the evidence, that the failure to perform any analysis of the environmental consequences likely to attend regraveling of the North Loop segment was clear error.

Based on a review of the entire record, the failure of BLM to prepare any environmental analysis of the effects of the planned re-rocking of the North Loop of the Steens Loop Road cannot be justified.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed and the case file is remanded for further action consistent with the foregoing.

James L. Burski
Administrative Judge

ADMINISTRATIVE JUDGE GRANT CONCURRING:

I find that I concur with the lead opinion to the extent that it holds that the Bureau of Land Management (BLM) decision cannot be affirmed in the absence of an environmental assessment (EA) analyzing the effects of the project and a finding of no significant impact (FONSI) based thereon.

The denial of appellants' protest was based on the BLM conclusion that the $ 1 million project to regravel the road is categorically excepted from the requirement to perform either an EA or an environmental impact statement (EIS). Under the Council on Environmental Quality (CEQ) regulations relevant to compliance with the provisions of NEPA, 1/ a categorical exclusion is defined as "a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations (§ 1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required." 40 CFR 1508.4.

The Department has promulgated guidelines for applying the CEQ regulations regarding NEPA compliance. With respect to categorical exclusions, the guidelines provide that:

> The following criteria will be used to determine actions to be categorically excluded from the NEPA process: (a) The action or group of actions would have no significant effect on the quality of the human environment; and (b) The action or group of actions would not involve unresolved conflicts concerning alternative uses of available resources.

516 DM 2.3.A.(1). In accordance with these criteria, certain classes of action were categorically excluded. Among these exclusions was: "Routine and continuing government business, including such things as supervision, administration, operations, maintenance and replacement activities having limited context and intensity; e.g. limited size and magnitude or short-term effects." 516 DM 2, App. 1 at 1.7.

Certain exceptions set forth in Appendix 2 apply to individual actions which would otherwise fall within a categorical exclusion. 516 DM 2.3.A.(3). 2/ "Environmental documents must be prepared for any actions involving these exceptions." Id. 3/ With respect to exceptions, the guidelines provide that:

1/ National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370 (1988).
2/ The regulation governing categorical exclusions provides that: "Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect." 40 CFR 1508.4.
3/ Environmental documents are defined to include EA's, EIS's, and FONSI's. 40 CFR 1508.10.

> The following exceptions apply to individual actions within categorical exclusions (CX). Environmental documents must be prepared for actions which may:
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> 2.2 Have adverse effects on such unique geographic characteristics as historic or cultural resources, park, recreation or refuge lands, wilderness areas, wild or scenic rivers, sole or principal drinking water aquifers, prime farmlands, wetlands, floodplains, or ecologically significant or critical areas, including those listed in the Department's National Register of Natural Landmarks."

516 DM 2, App. 2 at 2.2.

The BLM decision rejects the protest on the ground that the regraveling project qualifies as a categorical exclusion from preparation of an EA/EIS as a routine and continuing maintenance and replacement activity. This result is based on the finding that the regraveling constitutes maintenance of the road which had been graveled in 1975 rather than upgrading the road. This finding in turn is largely based on the provisions of the Recreation Area Management Plan (RAMP) which recognized that the section of the North Steens Loop Road up to Lily Lake had already been upgraded and graveled (RAMP at 25). Thus, the dissenting opinion finds at footnote 4 that graveling the road would entail no change from the status quo in that it would conform to the "prior or present intended use" provided in the RAMP.

While I agree that the regraveling project appears consistent with the planned role and status chosen for the road in the RAMP, the issue raised by the present appeal is whether BLM complied with NEPA in deciding to regravel the road in 1992. This Board has upheld proposed actions in the absence of either an EA and FONSI or an EIS where a categorical exclusion review (CER) was conducted and the record sustained a finding that the action did not fall within an exception to the categorical exclusion. Colorado Open Space Council, 73 IBLA 226 (1983). In that case, issuance of a drilling permit for an oil and gas well was sustained against a challenge on the basis of compliance with NEPA where the agency conducted a CER and found that the exceptions to the categorical exclusion did not apply. 73 IBLA at 232. The importance of this analysis of the applicability of an exception to the categorical exclusion has been recognized in court. Thus, in Jones v. Gordon, 792 F.2d 821 (9th Cir. 1986), issuance of a permit to Sea World for taking and exhibiting marine mammals pursuant to a categorical exclusion was reversed on the ground that the National Marine Fisheries Service had failed to analyze whether the permit fell within the scope of an exception to the categorical exclusion set forth in the agency guidelines. 792 F.2d at 828.

No such analysis of the applicability of the categorical exclusion or of any exception thereto is reflected in the record in this case. If such an analysis should be conducted, there is little doubt based on the record

before us that the regraveling and reconstruction of the road at issue does not qualify as "routine maintenance" for the reasons pointed out in the lead opinion. Regarding the exceptions to the categorical exclusion, I find there is also reason to believe the potential adverse effects on recreation land and/or wilderness study areas (WSA's) would preclude applying a categorical exclusion in this case.

In my view, there is little support for the BLM decision in our opinion in Sierra Club, 111 IBLA 122 (1989), cited by the dissenting opinion. An EA was conducted for the graveling of the road in that case. Further, the EA was conducted as a result of a judicial remand finding that the duty of BLM to protect lands within adjacent WSA's from unnecessary and undue degradation required at least an EA. Sierra Club v. Hodel, 848 F.2d 1068, 1092-93 (10th Cir. 1988).

Research discloses some support for not requiring an EIS for very substantial repair projects designed to restore bridges and roads to their prior condition of utility. In Sierra Club v. Hassell, 636 F.2d 1095 (5th Cir. 1981), the court considered a NEPA challenge to the proposal to construct a new highway bridge to Dauphin Island in coastal Alabama to replace the prior bridge destroyed by Hurricane Frederic. Noting that the Coast Guard classified the project as a categorical exclusion and finding that the duty to prepare an EIS is triggered by the regulations "when there is to be a change in the status quo," the court held that the environment to be considered was that with the old bridge in place before its destruction. 636 F.2d at 1099. In this context, the court found that the new bridge "does not significantly alter the status quo" notwithstanding the fact that the new bridge would be upgraded to modern design standards and that construction was slated to take 2 years at a cost of $ 30 million. Id. Finding that environmental impacts and mitigation measures were analyzed in reaching the decision to rebuild the bridge, the court found the record supported the finding that an EIS was not required. Id.

In Cobble Hill Ass'n. v. Adams, 470 F. Supp. 1077 (E.D.N.Y. 1979), the court reviewed a determination that a project to extensively repair a freeway was not a major Federal action under the regulations of the Federal Highway Administration and that the project would not have a significant effect on the environment. Despite plaintiff's argument the project was not an ordinary repair in view of the substantial planning required, the substantial cost of the work, and long duration of reconstruction work, the court found that it "only involves the repair of an existing highway." 470 F.2d at 1086 (emphasis in original). While acknowledging that "the repairs here are undoubtedly significant," the court held they did not require an EIS "since they will not result in any long-term changes in the environment, alterations in land use, planned growth or other consequences contemplated by statute and regulation." Id. Noting that "repair of the roadway contemplates preservation of the highway and not a departure from its present use," the court upheld the FONSI. Id. at 1086-87. Although these cases recognize that the environmental effects of repair and/or reconstruction projects may be analyzed in the context of the prior existing use, they do not support approval of an action on the basis

of a categorical exclusion without either a CER analyzing the applicability of the categorical exclusion or any exceptions thereto, on the one hand, or preparation of an EA and FONSI on the other hand.

Accordingly, I concur with the decision to remand this case to allow preparation of an EA and either a FONSI or an EIS.

C. Randall Grant, Jr.
Administrative Judge

ADMINISTRATIVE JUDGE MULLEN DISSENTING:

The Oregon Natural Desert Association, the Oregon Natural Resources Counsel, and the Oregon Wildlife Federation have appealed from the June 17, 1992, decision by the Burns, Oregon, District Office, Bureau of Land Management (BLM), denying their protest against regraveling an 18-mile segment of the Steens Loop Road between Page Springs Campground and Fish Lake. Appellants describe this action as a major road improvement project requiring environmental analysis. 1/ The majority agrees.

BLM prepared no environmental assessment (EA) or environmental impact statement (EIS) for regraveling the road. Appellants argue that BLM's failure to analyze the environmental effects of graveling the road violates the National Environmental Policy Act (NEPA), 42 U.S.C. § 4331 (1988), under which BLM would be required to prepare an EIS if its proposal constituted a major Federal action "significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(c) (1988).

Agencies are authorized to identify certain activities as categorically excluded from the requirement to prepare an EIS or an EA.

> "Categorical exclusion" means a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations (§ 1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required. An agency may decide in its procedures or otherwise, to prepare environmental assessments for the reasons stated in § 1508.9 even though it is not required to do so. Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.

40 CFR 1508.4.

The following criteria have been established by the Department to determine whether an action is categorically excluded from NEPA: "(a) The action or group of actions would have no significant effect on the quality of the human environment; and (b) The action or group of actions would not involve unresolved conflicts concerning alternative uses of available resources." 516 DM 2.3A.(1).

It is BLM's position that its proposed regraveling is maintenance of a road built for use by low clearance vehicles such as passenger cars, but

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1/ The appeals are predicated upon appellants' expressed belief that BLM should forego any road maintenance to exclude people who would travel the road in low clearance vehicles, such as passenger cars, and their expressed fear that additional visitors may threaten the beauty of the Steens Mountain environment their members enjoy.

which has deteriorated to the point that it can no longer be used without risk of damage. 2/ BLM states that it was not necessary to prepare an EA before regraveling the Steens Loop Road because this activity falls within the following categorical exclusion: "Routine and continuing government business, including such things as supervision, administration, operations, maintenance and replacement activities having limited context and intensity; e.g. limited size and magnitude or short-term effects." 516 DM 2, App. 1, 1.7 (emphasis added).

Appellants have the burden of showing that the BLM decision is erroneous. Yankee Gulch Joint Venture v. BLM, 113 IBLA 106, 129 (1990). They assert that this categorical exclusion is not appropriate for regraveling the loop road at a cost of nearly $ 1 million. They argue that the proposed action is neither routine nor continuing (Statement of Reasons (SOR) at 17), stating that the loop road has only been regraveled once in 30 years. 3/ They also suggest that BLM does not have the budget to support such activities on a routine or continuing basis, and that the upgrade of the loop road is the largest and most expensive BLM road project in the State of Oregon in 1992. They also state that visitor use of the Steens area has stressed the fragile areas of Steens Mountain (SOR at 18). They argue that BLM's proposal to restore the road to the same condition that existed in 1975 would remove the easiest means to limit access to this area. At the same time they admit that the road condition has deteriorated to its present lower standard.

Appellants' argument is predicated on their impression that BLM's plans support "no maintenance, no road projects, and pro[t]ect the area's pristine and fragile environment" (SOR at 3). The issue of whether the proposed action is maintenance or upgrading is readily resolved by examining the Steens Mountain Final RAMP issued in February 1985. When appellants' proposed use of the Steens Loop Road is compared with the Steens Mountain Final RAMP, it becomes clear that appellants are actually proposing a change from the status quo when urging that the road not be graveled. The RAMP contains BLM's decisions concerning road use in that area and indicate the existing and intended future uses of that road. For the Steens Loop Road, the RAMP provides:

> Upgrade the North Loop Road from Lily Lake to Wildhorse Lake Overlook to a high standard gravel road that will allow safe travel of passenger cars. This also includes the access roads into Kiger Gorge Overlook and the East Rim Overlook.
>
> The majority of the visitors drive from Frenchglen and Fish Lake Campground to the Wildhorse Lake Overlook and retrace their

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2/ Admitting that this road has not been regraveled for many years, BLM asserts that regraveling would only restore the road to the condition and use as described in its final Steens Mountain Recreation Area Management Plan (RAMP).

3/ This is an overstatement. The record indicates that the road was re-rocked in 1975, a 17-year span a 30-year span.

> route after a few hours of sightseeing. The road from Lily Lake to the Wildhorse Lake Overlook has not been upgraded and graveled as has the lower section. The spring thaws create deep gullies down the road and some areas are rough and rocky. Passenger cars with low ground clearance have difficulties traveling over this upper section and are damaged at times. Annual maintenance problems can also be reduced or eliminated if this road section is built to higher standards. [Emphasis added.]

(RAMP, Action I.D.1, at 25). The RAMP recognizes that the lower portion of the road (the portion BLM intends to regravel) had been graveled prior to 1985. Placing additional gravel on that segment would not constitute an upgrade. BLM stresses that the entire segment to Fish Lake was re-rocked in 1975, and that the regraveling project has always been considered as maintenance rather than an upgrading of the road.

The RAMP further distinguished between the Steens Loop Road and other roads:

> Keep existing roads other than the Steens Loop Road at their current low standard of construction to allow passage of high clearance vehicles.
>
> Low standard roads are compatible with providing recreation opportunities in a setting ranging from an essentially unmodified environment to one that is generally natural with moderate evidence of the sights and sounds of man. At times roads may be graded to allow passage of firefighting equipment, maintenance of reservoirs or other administrative uses at lower elevations. However, the existing roads other than the Steens Loop Road are not maintained on a regular schedule and, after a period of time, a graded secondary road at the lower elevations returns to a low standard of condition. [Emphasis added.]

Id. at 25.

When determining whether a proposed action calls for an EA or EIS, it is helpful to consider whether similar activities have been found to require an EA or EIS, determine how the proposal differs from the norm, and finally determine whether these differences are significant enough to dictate a different result. Glacier-Two Medicine Alliance, 88 IBLA 133, 140 (1985). 4/

4/ Appellants observe that an EA was required in Sierra Club, 111 IBLA 122 (1989), aff'd, Sierra Club v. Hodel, 737 F.Supp 629 (D. Utah 1990); aff'd, 949 F.2d 362 (10th Cir. 1991), remanded on other grounds, Garfield County v. Lujan, Civ. No. 90-C-776J (D. Utah Apr. 13, 1992), and cite 40 CFR 1507.2(b) in support of their contention that one is required here. It is important to remember that the Sierra Club case involved upgrading a road above its prior intended use. If we were to hold that BLM were required to

In Sierra Club v. Hassell, 636 F.2d 1095 (5th Cir. 1981), the court considered the Sierra Club NEPA challenge to proposed construction of a new highway bridge. This new $ 30 million bridge was to be built to completely replace a bridge which had been destroyed in a hurricane. The court considered whether the action qualified for the same categorical exclusion that BLM applied in this case and found that it did because the construction did not significantly alter the "status quo," even though the proposed bridge would take 2 years to build and was considered an "upgrade" from the destroyed bridge.

In this case BLM undertook to regravel an existing road surface which had deteriorated through wear and tear and the elements. The section of the road to be regraveled had been regraveled on at least two previous occasions. Without this work BLM would be unable to maintain the status quo -- a prime factor in appellants' motivation. Appellants presented no evidence that the cost of the project was out of line with the cost of similar maintenance projects in the area. Appellants presented absolutely no evidence that the frequency of regraveling was totally out of line with maintenance of similar roads in eastern Oregon. 5/

My colleagues find no problem concluding that appellants have carried the burden of proof that the proposed regraveling project does not qualify as routine maintenance. I do not agree.

Appellants have done little more than voice their concern that the proposed road maintenance will restore the road to its previous standard. Their arguments in support of the need for an EIS are no more than speculation. They allege that the size of the project and amount of time that has passed since the road was last regraveled are enough to remove the action from the categorical exclusion for routine maintenance based solely upon BLM's budget and the time since BLM last regraveled the road. However, they have presented no evidence that the cost of the project is other than routine, when compared with similar maintenance projects, or that the time span between regraveling the Steens Loop Road is unusual when compared with similar roads in the area.

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fn. 4 (continued)
prepare an EA to consider several alternatives, the "no action" alternative would entail regraveling of the road. That action makes no change from its prior or present intended use.

5/ I am also concerned that the majority opinion leaves BLM with a very difficult decision when contemplating any maintenance program that may not be both of little cost and continuous. Would a yearly maintenance program calling for regraveling 1 mile of road each year be routine maintenance, even though the overall cost would, in all likelihood, be much higher than regraveling 15 miles once every 15 years? What is the difference between a $ 30 million bridge replacement found to be maintenance and a $ 970 regraveling project that is not? Is it because natural deterioration is slower than a hurricane? If BLM had regraveled the road once every 10 years would it be routine maintenance?

There is no probative evidence that causes me to believe that BLM erred when it considered the regraveling of the Steens Loop Road as routine maintenance. 6/ The cost of a particular maintenance program does not, in and of itself, render a maintenance project other than routine. It must be shown that the cost is out of line with similar routine maintenance projects. 7/ Similarly, the mere fact that a maintenance project is not conducted on an ongoing basis does not make the maintenance something other than routine maintenance. 8/ There is also no basis for concluding that the combination of cost and time removes a maintenance program from the routine category. 9/ The majority assumes that appellants' unsupported allegations are both correct and probative, and reverses BLM on the basis of this assumption. There is no evidence supporting a reversal.

R.W. Mullen
Administrative Judge

6/ Nor am I swayed by the suggestion that BLM's failure to properly maintain the road has rendered placing gravel on the Steens Loop Road something other than routine maintenance. If routine maintenance calls for changing the oil in the car every 7,500 miles, is changing the oil rendered something other than routine maintenance if one does not change the oil for 10,000 miles? Should we not be asking whether placing gravel on a road like the Steens Loop Road is considered routine maintenance by other Federal, state, and county agencies responsible for road maintenance? There is not one iota of probative evidence that it is not.

7/ The routine maintenance program for a private aircraft usually calls for a complete overhaul (rebuild) of the engine after approximately 1,000 hours of use. This is not an inexpensive undertaking.

8/ In the course of routine maintenance of a house, the asphalt roof must be replaced every 15 to 20 years.

9/ If the combination of the two was a factor, the engine maintenance described in footnote 7 would be routine for a frequently flown aircraft but not routine for the same model of aircraft if it were flown less often. Is a 1-mile-a-year graveling program routine but one involving 10 miles of road every 10 years other than routine? A rational and objective test would be to compare the maintenance requirements for similar roads in the area. Appellants submit no evidence that stands up to this test.